Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76- 1022

M. M. MILES, JACK R. WOOD, and JACQUELINE S. WOOD,
Petitioners

v.

THE HON. J. FOY GUIN, U. S. DISTRICT JUDGE and BANK OF HEFLIN, a corporation, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

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INDEX

Page

OPINION BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 7

ARGUMENT AMPLIFYING THE REASONS RELIED UPON ... 8

CERTIFICATE OF SERVICE 18

APPENDIX A—ORDER of the Court of Appeals in case No. 76-3552, In re: *M. M. Miles, Jack R. Wood, and Jacqueline S. Wood,* which denied the writ of prohibition or mandamus for which application was made 1a

APPENDIX B—PETITION FOR SUPPLEMENTAL RELIEF OR, IN THE ALTERNATIVE AN ORIGINAL ACTION in Civil Action 76 G 0791 E, U.S. District Court for the Northern District of Alabama 2a

APPENDIX C—MOTION TO DISMISS PETITION FOR SUPPLEMENTAL RELIEF OR, IN THE ALTERNATIVE, AN ORIGINAL ACTION filed in Civil Action 76 G 0791 E, U.S. District Court for the Northern District of Alabama 12a

APPENDIX D—ORDER entered on 2 September 1976 in Civil Action 76 G 0791 E, U.S. District Court for the Northern District of Alabama, which denied the Motion to Dismiss (Appendix C) 14a

Page

APPENDIX E—Opinion of the Supreme Court of Alabama in Ex Parte *M. M. Miles,* et al. (In Re: *Bank of Heflin* v. *M. M. Miles),* 294 Ala. 462, 318 So.2d 697 (1975) 16a

APPENDIX F—Opinion of the Supreme Court of Alabama in *Miles v. Bank of Heflin,* 295 Ala. 286, 328 So.2d 281 (1976) 23a

APPENDIX G—Opinion of the Supreme Court of Alabama in *Miles v. Bank of Heflin,* 295 Ala. 286, 328 So.2d 281 (1976), on rehearing 35a

APPENDIX H—ORDER in *Federal Deposit Insurance Corporation* v. *Bank of Heflin and M. M. Miles, Jack R. Wood, and Jacqueline S. Wood,* Civil Action No. 75 G 1829 E in the U.S. District Court for the Northern District of Alabama 42a

TABLE OF CITATIONS

CASES CITED Page

Adkins v. *Underwood,* 520 F.2d 890 (7th Cir., 1975) 17

Atlantic Coast Line Railroad Co. v. *Brotherhood of Locomotive Engineers,* 398 U.S. 281, 90 S.Ct. 1739 (1970) 11

Brown v. *Chastain,* 416 F.2d 1012 (5th Cir., 1969) .. 11

Edelman v. *California,* 344 U.S. 357, 97 L.Ed. 387, S.Ct. 293 (1953) 9

In re *Estelle,* 576 F.2d 480 (5th Cir., 1975) 17

Fortune v. *Mulherrin* and *Cournoyer* v. *Town of Lincoln,* 533 F.2d 21 (1st Cir., 1976) 17

Francisco Enterprises, Inc., v. *Kirby,* 482 F.2d 481 (9th Cir., 1973) 17

In re *Huguley Manufacturing Company,* 184 U.S. 297, 22 S.Ct. 455 (1902) 17

Jack's Fruit Co. v. *Growers Marketing Service, Inc.,* 488 F.2d 493 (5th Cir., 1973) 15

Missouri ex rel. *Missouri Ins. Co.* v. *Gehner,* 281 U.S. 313, 74 L.Ed. 870, 50 S.Ct. 326 (1930) 9

In re *Rice,* 155 U.S. 396, 15 S.Ct. 149, 39 L.Ed. 198 (1894) 17

Smith v. *Whitney,* 116 U.S. 167, 6 S.Ct. 570, 29 L.Ed. 601 (1886) 17

Tang v. *Appellate Division of the New York Supreme Court,* 487 F.2d 138 (2nd Cir., 1973) .. 17

Will v. *United States,* 389 U.S. 90, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967) 17

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OPINION BELOW

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Fifth Circuit, entered in the case of *In Re: M. M. Miles, Jack R. Wood, and Jacqueline S. Wood,* No. 76.- 3552, entered on 26 October 1976 (Appendix A hereto) which denied petitioners' petition for a writ of prohibition or mandamus directed to the Honorable J. Foy Guin, U. S. District Judge.

JURISDICTION

The judgment of the United States Court of Appeals, Fifth Circuit, was entered on 26 October 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 and 28 U.S.C. 1651.

QUESTIONS PRESENTED

1. Does the District Court have jurisdiction again to hear and determine on their merits questions litigated by the parties in the Circuit Court of the State of Alabama and twice reviewed by the Supreme Court of Alabama, from which decisions no petition for writ of certiorari was made to this Court?

2. Is the writ of prohibition the appropriate method for preventing the District Court from exercising power beyond its jurisdiction?

STATUTORY PROVISIONS INVOLVED

The statutory provisions relied upon by the respondents to establish the jurisdiction of the District Court are 28 U.S.C. 1331, 28 U.S.C. 1343, and 28 U.S.C. 2283. All are set forth below:

Section 1331. *Federal question-Amount in controversy-Costs.*

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the

defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

Section 1343. *Civil rights and elective franchise.*--

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Section 2283. *Stay of State court proceedings.*

A court of the United States may not grant an injunction to stay proceedings in a State court

except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

STATEMENT OF THE CASE

The history of this case began in August, 1974. On the 12th day of that month the petitioner Miles wrote to the president of the Bank of Heflin a letter in which he demanded an opportunity to exercise his right as a shareholder to inspect the books and records of the Bank. That letter was followed on 19 August by another reiterating the demand. On 26 August the Bank of Heflin filed a complaint for declaratory judgment against Miles in the Circuit Court of Cleburne County, Alabama. In its complaint, the Bank averred that it had in its possession confidential information relative to its depositors and borrowers the disclosure of which would subject it to legal actions and penalties. There was no averment in the complaint that the petitioner sought to inspect the books and records of the Bank for any improper purpose. In its complaint the Bank also referred to reports of examination by the Federal Deposit Insurance Corporation and State banking authorities and said that it was by law prevented from disclosing their contents. Subsequently, the other two petitioners sent similar letters to the Bank and were joined as parties defendant in its action against Miles.

Thereafter, following the filing of the answers and counter-claims of the defendants and cross-motions for summary judgment by both sides, the circuit court entered an order limiting the right of the shareholders to examine the books and records. An application for a writ of mandamus to revise the order was made to the Supreme Court of Alabama on 12 November 1974 and the next day that court issued its rule nisi to the circuit judge ordering a revision of the order to permit

unfettered examination of all books and records. A response was filed on behalf of the trial judge by the Bank and the matter subsequently was argued to the Supreme Court of Alabama. The Bank lost. (Appendix E hereto.) An application for a re-hearing was made to the Supreme Court of Alabama and an additional brief filed by the Bank (attaching as an exhibit certain Regulations of the Federal Deposit Insurance Corporation). The Bank's application for re-hearing was denied. No application to this Court for certiorari was filed.

In the meanwhile, the defendants (here, the petitioners) had taken an appeal from that portion of the circuit court's order relative to the cross-motions for summary judgment on the counter-claim. One of the assignments of error (no. 6) filed with the record was that the trial court "erred in holding that 'there was no refusal of Plaintiff (Bank) to defendants to see said records and that the filing of the Declaratory Judgment action does not constitute refusal or denial of the records.' " The appeal was briefed and argued to the Supreme Court of Alabama. On 18 December 1975 judgment was entered on the appeal. (Appendix F hereto.) The Bank lost. Subsequently, after employment of new counsel, an application for re-hearing was filed. In that application was stated each and every point raised in the "Petition for Supplemental Reliff *(sic.)* or, in the Alternative, an Orginal Action," now before the District Court (Appendix B hereto). On 5 March 1976 the Supreme Court of Alabama extended its original opinion and reaffirmed its prior judgment. (Appendix G hereto.) The Bank once again had lost. No application to this Court for a writ of certiorari was filed.

With the case once more in the hands of the circuit court for the purpose of assessing the penalty to be

awarded to the petitioners and for the purpose of carrying out the order of the Supreme Court of Alabama that the petitioners be allowed to examine the books and records of the Bank of Heflin (an examination to this day incomplete), the Bank has made through the means of the action now before the District Court another effort to thwart the petitioners in their efforts to achieve their legitimate purposes. Having failed in every other attempt, the Bank now seeks the aid of the District Court in an effort to re-litigate the issues which have been resolved unfavorably to it on every occasion on which they have been raised.

The Bank's "petition" was filed with the District Court on 4 June 1976. The petitioners' motion for an order dismissing it was filed 28 June 1976 and argued and submitted on 9 July 1976. The motion (Appendix C hereto) clearly pointed out the want of jurisdiction in the District Court again to permit litigation of the claims stated in the Bank's "petition." After submission of briefs, Judge Guin entered his order of 2 September 1976 (Appendix D hereto) denying the motion and ordering the petitioners to answer the Bank's complaint. The only construction possible is that the District Court has determined to exercise jurisdiction and to re-try issues already presented to and decided by the courts of Alabama, as the "petition" of the Bank shows on its face that the issues raised in it already have been decided by the courts of Alabama.

After Judge Guin entered his order denying the petitioners' motion to dismiss the Bank's petition, the petitioners applied to the United States Court of Appeals, Fifth Circuit, for a writ of prohibition or mandamus prohibiting Judge Guin from proceeding further with the case or ordering him to enter an order granting the motion. It is to review the denial of that

application that the petitioners seek a writ of certiorari from this Court.

This "basis for federal jurisdiction in the court of first instance," as claimed by the Bank, is two sections of Title 28, U.S.C., *viz.*, 1331 and 1343. It is the heart of the petitioners' argument that there is *no* basis for federal jurisdiction under the circumstances of the case.

REASONS FOR GRANTING THE WRIT

1. The action brought by the Bank now pending in the District Court to which these petitioners have been ordered to respond on the merits amounts to an appeal from decisions of the highest court of a State (the Supreme Court of Alabama) to the lowest level of the Federal court structure. The issues between the petitioners and the Bank in the District Court action have been resolved by the Supreme Court of Alabama in two separate decisions expressed in three opinions. The "petition" of the Bank makes this inescapably clear and, indeed, complains of its treatment at the hands of the Supreme Court of Alabama as its grounds for relief. The relief prayed for is that the District Court enjoin enforcement of the orders of the Supreme Court of Alabama and that portions of the judgment of that court be "set aside and held for naught." In neither instance was an attempt made by the Bank to correct the asserted errors in those decisions by applying to this Court for a writ of certiorari. That was its sole and proper remedy. Instead, the Bank took no action at all for ninety-one days and then, on the next day after its last day for filing the appropriate petition with this Court, filed its action in the District Court.

2. In the present posture of this matter, the District Court has no jurisdiction to entertain such a complaint. The want of jurisdiction of the District Court clearly was spelt out in the petitioners' motion to dismiss the

Bank's action. It also was brought to the attention of Judge Guin by oral argument and by a brief filed subsequently in which the numerous and uniform decisions of this Court and the Courts of Appeal were identified and analyzed. If the District Court has the jurisdiction which it is undertaking to exercise in this case, it quite simply has assumed appellate jurisdiction over the highest courts of the States, a jurisdiction reserved to this Court by the Constitution and under all the relevant decisions. If the District Court has such jurisdiction, no case litigated to a conclusion in the courts of any State can be finished until finally it has wound its way through the Federal system also, from the bottom to this Court, and every claimed Federal right again has been disposed of.

3. Unless a rule of Constitutional Law unique to the Northern District of Alabama is to be allowed by this Court to exist, the Court of Appeals, Fifth Circuit, must be instructed to change its judgment in this case and to order the issuance of the writ of prohibition or mandamus to Judge Guin. The order of the Court of Appeals denying the petition for the writs amounts to sanctioning so far a departure by the District Court from the accepted and usual course of judicial proceedings as to call forth an exercise of this Court's power of supervision.

4. The extraordinary writ of prohibition prayed for in the petitioners' petition to the Court of Appeals is a meet and appropriate remedy in the circumstances of this case and is, in fact, the only remedy effective under the conditions obtaining.

ARGUMENT AMPLIFYING THE REASONS RELIED UPON

Not only did the Bank have an adequate opportunity to raise and argue any Federal question which might be

said to arise in this case but, in the course of filing with the Supreme Court of Alabama four briefs, two each on the main case, two each on application for re-hearing, it actually did in those submissions raise each and every issue relied upon in its petition to the District Court. As a general proposition, the timeliness with which the Federal question is raised is a matter for state court procedure. *Edelman v California,* 344 U.S. 357, 97 L. Ed. 387, 73 S. Ct. 293 (1953). But such an issue may be raised *even on petition for re-hearing to the state appellate court* under appropriate circumstances (such as the unexpected arising of the Federal question without previous opportunity to anticipate and argue it). *Missouri* ex rel. *Missouri Ins. Co. v Gehner,* 281 U. S. 313, 74 L. Ed. 870, 50 S. Ct. 326 (1930).

In this case, there can be no question but what the facts out of which arises any Federal question identified by the Bank of Heflin were known and formed the basis of the Bank's argument from the start. As previously has been pointed out, the Regulations of the F.D.I.C. were mentioned in the Bank's original complaint in the State court and were cited to the Supreme Court of Alabama so early as the application for a re-hearing of the judgment for the writ of mandamus (and, indeed, orally had been argued before that court prior to the decision on the issuance of the writ). The petitioners' assignment of error number six in the record on appeal stated the question of the filing of the action for a declaratory judgment as a refusal of the shareholder's demand. All of the points raised in the "petition" presently before the District Court were raised in the Herculean efforts of the Bank to obtain a re-hearing of the judgment the enforcement of which it now seeks to enjoin. It cannot be said by the Bank either that it never before has had an opportunity to raise a Federal question or that it was in no position to

follow the steps appropriate to obtain a review of the decision on any such Federal question by the courts of the United States. It had the opportunity to apply to this Court for the issuance of a writ of certiorari to the Supreme Court of Alabama in connection with either the decision on the writ of mandamus or the decision of 18 December 1975 on the appeal.

One reading the petition of the Bank to the District Court (Appendix B) notices that it was filed in an action brought originally by the Federal Deposit Insurance Corporation against the Bank itself. That action had been filed to keep reports of examination of the F.D.I.C. from being revealed to these petitioners. The action was brought to a conclusion by an order entered on 26 November 1975 (Appendix H hereto) in which Judge Guin granted the relief requested by the F.D.I.C. Since the entry of that order (the hearing for which antedated by ten days the oral argument on the appeal to the Supreme Court of Alabama), no attempt of any sort has been made by any petitioner to see what Judge Guin has excluded from their ken. (As a matter of fact, all copies of the actual reports of examination of the F.D.I.C. long before had been removed from the Bank. The only matter in issue was references in the Bank's Minute Book to those reports occurring at directors' meetings.) It cannot be claimed truthfully by the Bank that the District Court needed to assume jurisdiction of the whole dispute between the parties in order to protect its order of 26 November 1975; such is simply not the case. Nor could there be any color to the claim that by the said order Judge Guin did in fact assume jurisdiction over the dispute; all parties hereto equally would have been astonished if that had been suggested prior to the filing of the Bank's presently pending action in the District Court.

"It is obvious from the complaint and the requested

relief that the appellants are here attempting to relitigate their federal constitutional claims by obtaining a form of direct federal district court review of the state decisions, since independent equitable proceedings to prevent the enforcement of a judgment are considered a direct attack upon it. * * * The District Court was patently without jurisdiction to engage in such a review." *Brown v Chastain,* 416 F. 2d 1012, 1013 (5th Cir., 1969). There could be no more succinct statement of the position of the Bank in this action than that quoted above. The *Brown* case involved an effort to obtain, by means of a mandatory injunction from a federal district court, a transcript for the purposes of appeal within the system of state courts of the State of Florida. The plaintiff desired the transcript at the cost of either the State or the other parties to the litigation. The basis of the federal action was denial of due process and equal protection under the Fourteenth Amendment by reason of the failure of the Florida trial court to order the provision of such a transcript. Over a lengthy dissent by Judge Rives, the Fifth Circuit reversed the decision of the district judge and instructed him to dismiss the complaint for lack of jurisdiction. Application was made and denied for *en banc* hearing and application to this court for a writ of certiorari also was denied. (397 U.S. 951)

The following year this Court decided *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 90 S. Ct. 1739 (1970). That case was an action by the Brotherhood to obtain an injunction from the U.S. District Court restraining the enforcement of an injunction obtained by the railroad company from a state court in the State of Florida. The problems arose out of a labor dispute and the picketing of a switching yard by members of the Brotherhood. The district judge granted the injunction. The opinion, by Mr. Justice Black, (after stating the facts of the case)

commenced by analyzing the historical background and policy which lay behind the enactment in 1793 of the anti-injunction statute (28 U.S.C. 2283):

> While the lower federal courts were given certain powers in the 1789 Act (Judiciary Act of 1789), they were not given any power to review directly cases from state courts, and they have not been given such powers since that time. Only the Supreme Court was authorized to review on direct appeal the decisions of state courts. Thus from the beginning we have had in this country two essentially separate legal systems. Each system proceeds independently of the other with ultimate review in this Court of the federal questions raised in either system. Understandably this dual court system was bound to lead to conflicts and frictions. Litigants who foresaw the possibility of more favorable treatment in one or the other system would predictably hasten to invoke the powers of whichever court it was believed would present the best chance of success. Obviously this dual system could not function if state and federal courts were free to fight each other for control of a particular case. Thus, in order to make the dual system work and "to prevent needless friction between state and federal courts," (citation omitted) it was necessary to work out lines of demarcation between the two systems. Some of these limits were spelled out in the 1789 Act. Others have been added by later statutes as well as judicial decisions. The 1793 anti-injunction Act was at least in part a response to these pressures.

On its face the present Act (28 U.S.C. 2283)

is an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions. The respondents here have intimated that the Act only establishes a "principle of comity," not a binding rule on the power of the federal courts. The argument implies that in certain circumstances a federal court may enjoin state court proceedings even if that action cannot be justified by any of the three exceptions. *We cannot accept any such contention.* In 1955 when this court interpreted this statute, it stated: "This is not a statute conveying a broad general policy for appropriate *ad hoc* application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions. (Citation omitted.) Since that time Congress has not seen fit to amend the statute and we therefore adhere to that position and hold that any injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to Section 2283 if it is to be upheld. Moreover since the statutory prohibition against such injunctions in part rests on the fundamental constitutional independence of the States and their courts, the exception should not be enlarged by loose statutory construction. *Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court.* 398 U.S. 281, 286. (Emphasis supplied.)

Although the injunction sought was against the railroad only, the court held that there could be no question but that the intent of the injunction was "to stay proceedings in a State court," and that the prohibition of the statute could not be evaded by addressing the order to the parties or prohibiting utilization of the results of a completed state proceeding.

Thereafter, Mr. Justice Black, noting that there was no question about there being any express Congressional authorization for an injunction in the situation before the Court examined the position of the Brotherhood that the injunction was proper either as the means to protect or effectuate the original refusal of the District Court to enjoin the picketing or that it was necessary in aid of the jurisdiction of the District Court. As has been pointed out above, neither of these grounds possibly can apply in this case. The order of this court dated 26 November 1975 pertains solely to portions of certain documents specified in it, which the court found to contain extracts from materials supplied by the F.D.I.C. The reports themselves had been removed from the premises of the Bank of Heflin and were not available, in any event, to be produced for inspection by the petitioners. None of the petitioners since the entry of that order has made any effort to peek at the sequestered material nor has the Bank alleged or suggested that such is or might be the case. It is, moreover, unarguably certain that the District Court did not assume jurisdiction over the whole controversy between these defendants and the Bank by entering its order of 26 November 1975 at the instance of the F.D.I.C. None asked that it do so and all would have been appalled had it done so. In other words, neither the arguments made by the Brotherhood in the *Atlantic Coast Line* case is available here to the Bank.

The decision of the Supreme Court of Alabama of 18 December 1975 was predicated on grounds entirely different from any related to the F.D.I.C. reports, on facts admitted by the parties to be undisputed in accordance with Alabama procedure, and after such argument as the Bank cared to make about all issues of Alabama law and any issue involving a Federal question. (Indeed, while searching for something to argue to persuade the Supreme Court of Alabama to change its judgment, the Bank raised, fleetingly, the idea that it had been denied "due process" and, on page 79 of its brief in support of its application for rehearing, disposed of it in two and one-half lines of typescript.)

Subsequent to the decision in the *Atlantic Coast Line* case, the Fifth Circuit decided a case dealing with claims similar to those presently being made by the Bank. *Jack's Fruit Co. v. Growers Marketing Service, Inc.*, 488 F. 2d 493 (5th Cir., 1973), was an appeal from the dismissal of an action filed in the U.S. District Court which sought an injunction against the enforcement of a money judgment rendered in the state courts of Florida. The grounds asserted were that it was void for lack of jurisdiction and void for lack of notice. The defendants (appellees) originally received a damage award from the Florida Citrus Commission against the plaintiff. The defendant appealed that award asking for damages greater than the amount included. The award was modified favorably to the defendants by the Florida District Court of Appeals and the plaintiff applied for a re-hearing. Its application was denied. The plaintiff then petitioned the Supreme Court of Florida for an extraordinary writ to vacate and stay the enforcement of the order of the District Court of Appeal. The writs were refused. Thereafter, the plaintiff brought the action then before

the Fifth Circuit. The plaintiff's (appellant's) arguments were disposed of by Judges Bell, Coleman, and Roney in the following language:

> In civil litigation, except for habeas corpus proceedings, a federal district court has no jurisdiction to review final determinations of federal constitutional questions voluntarily submitted to and decided by state courts. (Citations omitted.) This principal extends to alleged due process violations such as lack of notice. See *American Surety Co. v. Baldwin,* 287 U.S. 156, 53 S. CT. 98, 77 L. Ed. 231 (1932). In that case the Supreme Court stated that the Surety Company, having challenged a state judgment against it in an independent state action that afforded the opportunity of raising the issue of lack of notice could not base a federal court action to enjoin enforcement of the state court judgment on the same issue. Similarly, the Supreme Court has held that the doctrine of *res judicata* bars subsequent attack on a court's subject matter jurisdiction, if the parties had full opportunity to raise that question in the prior proceedings. (Citation omitted.)
>
> In this case, Jack's not only had, but actually availed itself of, the opportunity to litigate before the State courts the issues raised on this appeal. Therefore, as the federal district court determined, the doctrine of *res judicata* bars relitigation. To obtain a federal determination of its federal questions, Jack's should have sought review of the state court action in the United States Supreme Court. (Citing *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers.)* 488 F. 2d 493, 494. (Emphasis supplied).

It would burden this argument to an unwarranted extent if all of the recent cases supporting the argument that the District Court is without jurisdiction to hear this case were examined individually. It ought to suffice to point out that the First Circuit *(Fortune v. Mulherrin* and *Cournoyer v. Town of Lincoln,* 533 F. 2d 21 [1976]), Second Circuit *(Tang v. Appellate Division of the New York Supreme Court,* 487 F. 2d 138 [1973]), Seventh Circuit *(Adkins v. Underwood,* 520 F. 2d 890 [1975]), and Ninth Circuit *Francisco Enterprises, Inc., v. Kirby,* 482 F. 2d 481 [1973]) all consistently have followed the principles set forth in the *Atlantic Coast Line* case. The fact that so many of the Circuits lately have had to reaffirm what is so basic a proposition itself suggests the danger of failing to act in this case. If ever a trickle of such claims is permitted, a flood soon will follow.

The writ of prohibition is the plain and only appropriate remedy in such a case as this. "It is firmly established that where it appears that a court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to the writ of prohibition as a matter of right." In re *Huguley Manufacturing Company,* 184 U.S. 297, 22 S. Ct. 455, 456 (1902). See also *Smith v. Whitney,* 116 U.S. 167, 6 S. Ct. 570, 29 L. Ed. 601 (1886), and In re *Rice,* 155 U.S. 396, 15 S. Ct. 149, 39 L. Ed. 198 (1894). The petitioners recognize that the decisions are filed with statements about the discretionary nature of the writ and its reservation for use only in the clearest of cases *(e.g., Will v. United States,* 389 U.S. 90, 88 S. Ct. 269, 19 L. Ed. 2d 305 [1967] and In re *Estelle,* 576 F. 2d 480 [5th Cir. 1975]). In this instance, however, the extraordinary circumstances justify, even dictate its employment. There is no fact *germane to this issue* to be found at the

trial level: the petition of the Bank shows on its face the facts fatal to the District Court's jurisdiction. The question is exclusively one of jurisdiction: exactly the historical occasion for the use of the writ. And, the "drastic" remedy fully is justified by the situation: if the writ prayed for is not issued and the Court of Appeals directed to issue the writ of prohibition these petitioners are going to be forced to relitigate this whole case, from beginning to end, making a cruel joke of the time, effort, and expense thus far devoted to its successful prosecution.

Respectfully submitted,

JAMES D. PRUETT
610 Chestnut Street
Gadsden, Alabama 35901
Counsel for Petitioners

CERTIFICATE OF SERVICE

I, James D. Pruett, counsel for petitioners and a member of the Bar of the Supreme Court of the United States, certify that I have served a copy of the foregoing Petition for a Writ of Certiorari on Messrs. Wilson, Propst & Isom, 822 Leighton Avenue, Anniston, Alabama 36201, and John S. Casey, Esq., 206 Burns Street, Heflin, Alabama 36264, attorneys for the respondent Bank of Heflin, and on the Honorable J. Foy Guin, United States District Judge, United States Courthouse and Federal Building, Birmingham, Alabama 35203, by depositing the same in a United States Post Office, with first class postage prepaid, addressed to them at the above addresses, the 24th day January, 1977.

JAMES D. PRUETT
Counsel for Petitioners

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

No. 76-3552

In Re:

M. M. MILES, JACK R. WOOD and JACQUELINE S. WOOD,
Petitioners

On Petition for Writ of Prohibition and/or Mandamus to the United States District Court for the Northern District of Alabama

Before WISDOM, GEE and TJOFLAT, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of prohibition and/or mandamus is DENIED.

U.S. COURT OF APPEALS
FILED

OCT 26 '76

EDWARD W. WADSWORTH
CLERK

APPENDIX B

IN THE UNITED STATES DISTRICT COURT OF THE
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

CA 76 GO791E

FEDERAL DEPOSIT INSURANCE CORPORATION, a corporation organized and existing under the laws of the United States of America,

Plaintiff

v.

BANK OF HEFLIN, an Alabama banking corporation,

Defendant

and

M. M. MILES, JACK R. WOOD, and JACQUELINE S. WOOD,

Intervening Defendants

PETITION FOR SUPPLEMENTAL RELIEF or, in the ALTERNATIVE, an ORIGINAL ACTION

This Court has jurisdiction of this cause because of its previous consideration of certain of the matters alleged herein, and further under the provisions of United States Code provisions, Title 28, Sections 1331 and 1343.

The amount in controversy exceeds $10,000.00. The allegations of the previous pleadings in this case with regard to jurisdiction are hereby adopted.

1. Defendant, Bank of Heflin, was made a party to this cause by the Plaintiff, Federal Deposit Insurance Corporation upon the filing of its complaint, seeking a temporary restraining order, permanent injunction and other relief, to prevent the disclosure of certain records relating to the Plaintiff. A temporary

restraining order was issued by this Court which was made permanent on the 26th day of November, 1975.

At the time of the issuance of both of the above orders there was on appeal to the Supreme Court of Alabama an order of the Circuit Court of Cleburne County, Alabama dated October 25, 1974, wherein the said Circuit Court had denied to the Intervening Defendants herein certain records of Defendant Bank.

Acting in compliance with the order of this Court enjoining Defendant Bank from producing certain records specified therein, the Defendant Bank refused to let the stockholders (intervenors herein) examine the stated records.

2. That the said order of the Circuit Court of Cleburne County was based on a complaint filed by said Bank asking for declaratory relief partially based on the fact that said Bank had in its possession certain records and reports of examination, by the Plaintiff herein, which records and reports the Intervening Defendants had demanded to inspect along with other records of the Bank. A copy of said complaint being attached hereto as Exhibit A.

3. That on the 21st of August, 1975, the Supreme Court of Alabama entered a judgment based on a mandamus petition filed by said Intervening Defendants, with said Supreme Court of Alabama, a copy of said judgment is attached hereto as Exhibit B. The effect of said order was to require said Bank of Heflin to allow the said Intervening Defendants to inspect all of its books and records, including certain minutes and records which said Bank is forbidden to reveal to individuals, in the class of the Intervening Defendants herein, by said Federal Deposit Insurance Corporation, the Plaintiff herein, and notwithstanding the restraints and regulations imposed on said Bank by said F.D.I.C. That said Supreme Court of Alabama

issued said order notwithstanding that said Bank had alleged in its original complaint, filed in said Circuit Court, that it was forbidden to reveal said minutes and records to Intervening Defendants and notwithstanding that the briefs filed with said Supreme Court with regard to said mandamus petition included a copy of said F.D.I.C. regulation giving the Supreme Court of Alabama actual notice of said regulation. In said mandamus case before the Supreme Court of Alabama, said Supreme Court issued an opinion dated the 21st day of August, 1975, which referred to the said Bank's dilemma with regard to said F.D.I.C. regulation, but did not further discuss said regulations or limit its order in anyway as a result of its knowledge thereof. That this Court's order of November 26, 1975 was necessitated thereby.

4. That said appeal to the Supreme Court of Alabama from said Circuit Court order dated October 25, 1974 resulted in an opinion of said Court dated December 18, 1975. Said opinion is attached hereto as Exhibit C.

5. That Plaintiff filed a motion for rehearing with regard to said opinion dated December 18, 1975, a copy of which is attached hereto as Exhibit D. That on March 5, 1976, said Supreme Court of Alabama extended its opinion dated December 18, 1975 with an opinion attached hereto as Exhibit E. That, based on said opinions attached as Exhibits C and E, said Supreme Court of Alabama issued a judgment dated the 5th day of March, 1976 which is attached hereto as Exhibit F. That in said opinion attached as Exhibit E, the said Supreme Court of Alabama made reference to Plaintiff's claim and allegations with regard to said F.D.I.C. regulations; but after mentioning said matter gave no further consideration to said F.D.I.C. regulations nor even discussed said regulations with

regard to Plaintiff's having reasonable cause to refuse to allow Defendants to inspect records contrary to said F.D.I.C. regulations.

6. That the judgment of said Supreme Court of Alabama attached as Exhibit E is contrary to Federal Law and the order of this Court dated the 26th day of November, 1975, in that said judgment of said Supreme Court of Alabama conclusively subjects the Plaintiff to a penalty under the provisions of Title 10, Section 21 (46) Code of Alabama 1940 as recompiled in 1958 in an amount which will fall between $25,000.00 and $40,000.00, notwithstanding that the Plaintiff filed said original complaint with the Circuit Court of Cleburne County, Alabama in order to determine its obligations under said Title 10, Section 21 (46) with respect to said F.D.I.C. regulations and other matters. That the demands made on said Bank by Intervening Defendants to inspect its records, which said demand letter is attached hereto as Exhibit G, was broad enough to include records and minutes which said F.D.I.C. regulations forbid inspection of by said intervenors. That said demand letter said Intervening Defendants would accept "no limitation on their examination.———."

7. That the said judgment of the Supreme Court of Alabama, attached hereto as Exhibit E ignored the prior orders of this Court and the injunctions previously issued by it of which said Supreme Court had notice. Further that the Supreme Court of Alabama denied the said Bank due process of law by arbitrarily granting a motion for a summary judgment at the appellate level of which the said Bank had no notice or opportunity to be heard and when the trial court did not have such a motion before it at the time if its judgment and which motion in fact was not filed until seven days after the trial judge heard the case. By

ordering the said penalty said Supreme Court of Alabama denied said Bank access to the courts of Alabama for a hearing to determine its obligations under said Title 10, Section 21 (46). Any such construction placed on said Title 10, Section 21 (46) unconstitutionally deprives sand Bank and its other stockholders of their property without due process of law contrary to Federal Law and the United States Constitution. That in addition to arbitrarily ignoring said F.D.I.C. regulations in entering its judgment dated the 5th day of March, 1976, in conflict with said F.D.I.C. regulations, said Supreme Court of Alabama entered said judgment attached as Exhibit E in violation of the provisions of the 14th Amendment to the United States Constitution, particularly the due process and equal protection of the law provisions thereof for all the reasons and causes specifically set out in Plaintiff's application for rehearing to said Supreme Court of Alabama attached as Exhibit D hereto, which said Exhibit D and the said causes and reasons set out therein are incorporated herein by reference and made a part hereof as if fully set out herein. That the order of said Supreme Court of Alabama was arbitrary, capricious and discriminatory for the reasons and causes set out therein and further set out in Section 9 hereafter.

8. Defendant Bank further alleges that the Supreme Court of Alabama ignored, and in fact never once alluded to, the prior judgment of this Court and the injunction previously issued by it. That said Bank was subjected to the penalty adjuged by the Alabama Supreme Court by complying with the said F.D.I.C. regulations. That the power of this Court must be invoked under the provisions of 28 USC Section 2283 to protect and effectuate its judgment of November 26, 1975 which in effect held that Defendant Bank was

bound by said F.D.I.C. regulations.

9. Defendant Bank of Heflin further alleges that the rulings and opinions of the Supreme Court of Alabama were arbitrary, capricious and discriminatory and violated the Due Process and Equal Protection of the Law Clauses of the United States Constitution as reflected by the following:

a. Said opinions, Exhibits C and E of the Supreme Court arbitrarily and capriciously consider "Affidavits" which were not sworn to and in one instance, not signed, in violation of ARCP Rule 56.

b. Said Court directed the trial Court to grant a motion for summary judgment although Plaintiff had absolutely no notice of it prior to the only hearing held by the Circuit Court of Cleburne County, Alabama, all contrary to ARCP Rule 56 and said 14th Amendment.

c. Said Court held that the burden of proof on the summary judgment motion, it granted, was on a non-movant, contrary to all its decisions and holdings before and after said holding.

d. Said Court decided a factual matter of "reasonable cause" as a matter of law, without a discussion of any of the principles previously developed by said Court for determining "reasonable cause", and without citing a single case in support of said holding and contrary to the argument of the Intervening Defendants, further said Court gave no consideration in determining reasonable cause that said Title 10, Section 21 (46) and F.D.I.C. regulations are in conflict.

e. Said Court did not even discuss the defense of lack of "good faith" available to Plaintiff under said statute, although it was not negatived by intervenors and there was evidence to the contrary.

f. Said Court granted relief in excess of and contrary to that to which the Defendants argued in briefs that they were entitled, even though said Court

was operating under rules which said that matters not argued in briefs are waived.

g. Said Court granted a motion, the denial of which was not assigned as error nor appealed from by Intervening Defendants, although said Corut's rules are to the contrary.

h. Said Court's decision was made totally on its own initiative without any argument to that effect by Intervening Defendants, but with Intervening Defendants arguing to the contrary to said Court.

i. Said Court decided, without citing a single case, in support of the doctrine, that when the Plaintiff filed a suit in the Circuit Court of Cleburne County, Alabama to determine its obligations under said Title 10 Section 21 (46), with regard to various matters, including any conflict with F.D.I.C. regulations, it was per se unreasonable and per se a "refusal" under the provisions of said Title 10, Section 21 (46) although other cases of said Court (one decided shortly after) hold that a denial of access to the Courts of Alabama is against the public policy of Alabama.

j. Said Court interpreted the statutory language of said Title 10, Section 21 (46) contrary to all other cases of other jurisdictions which have interpreted the same language (including Illinois), although the other cases say that said Court's interpretation and construction with regard to the amount of the penalty is *irrational and unfair,* and said Court had previously held that Illinois cases were to be given weight in construing said Statute because the Alabama Statute was patterned on the Illinois Statute.

k. Said Court failed to discuss or apply the "Scintilla Rule" of said Court with regard to evidence on summary judgment motions although all previous and subsequent opinions of said Court have done so. Said court never discussed or mentioned one single fact

favorable to Plaintiff although such facts were before said court.

l. Said Court decided the statutory defense of "proper purpose" based on blanket, unsupported allegations by Defendants not supported by fact, or, in any event with there being a Scientilla to the contrary.

m. Said Court has repeatedly examined all matters of law and fact solely in a light favorable to intervenors although all its previous and subsequent holdings on summary judgment motions are to the contrary and provide that nonmovants should be given the benefit of every doubt.

n. Said Court never discussed the meaning of books and *records of account,* although all other cases hold that of account is more restrictive than the common law term or prior statutory term of "books and records".

o. Said Court arbitrarily and capriciously determined that the intervenors had a right to examine confidential deposit and loan records of customers, without intervenors having stated any reason or purpose therefor.

p. Said Court upheld the validity of "an unlimited" demand of inspection by intervenors although the Court held, in the same case, and all previous cases, that such right is not unlimited.

q. Said Court reviewed, on appeal, the denial of a motion for summary judgment even though said denial was not argued or assigned by intervenors and even though the vast majority of cases cited in 15 ALR 3rd 889 states that such a denial is not even reviewable, and said Court had previously held that the denial of a motion for summary judgment is discretionary with the trial court.

r. Said Court stated that the trial Court had found that there were *no* disputed issues of fact, when, in fact,

the trial Court said that there were none on the *original complaint not on the counter claim.*

s. Said Court considered a matter which the Court acknowledged was not considered by the trial court even though hundreds of previous Alabama cases consistently held to the contrary.

WHEREFORE, THE PREMISES CONSIDERED, Defendant Bank of Heflin prays for the following relief from the Intervening Defendants herein:

1. That this Court will enter an order enjoining Intervening Defendants from any further proceedings in the Circuit Court of Cleburne County, Alabama with regard to this cause pending a final hearing hereof.

2. That this Court will enter an order enjoining the enforcement by Intervening Defendants of that provision of the judgment and opinion of the Supreme Court of Alabama ordering the Defendant Bank to pay to the intervenors herein the penalty provided by Title 10 Section 21 (46) of the Code of Alabama 1940 as recompiled and amended.

3. That this Court will set aside and hold for naught the portions or the judgment and order of the Supreme Court of Alabama that conflicts with the order of this Court dated November 26, 1975.

4. That this Court issue all such orders as may be necessary to protect or effectuate its prior judgment and enjoin the enforcement by Intervening Defendants judgments of all courts in conflict therewith or such portions of any such judgments that impair the effect of the prior judgment of this Court.

5. That this Court enter such orders as may be necessary to permanently enjoin Intervening Defendants from further proceeding in the Circuit Court of Cleburne County, Alabama, seeking to enforce the penalty ordered by the Supreme Court of Alabama, in its judgment and rulings of December 18, 1975, and March 5, 1976.

6. That this Court enter all such orders to protect the defendant Bank and its other stockholders from being deprived of their property without due process of law and without equal protection of the law.

7. Defendant Bank of Heflin prays for such other, further and different, additional general or special relief to which it may in equity and good conscience by entitled in the premises.

JOHN S. CASEY and ROBERT B. PROPST

/s/ By: JOHN S. CASEY
Attorney for Defendant
Bank of Heflin

FILED IN CLERK'S OFFICE
NORTHERN DISTRICT OF ALABAMA

JUN 4 1976

JAMES E. VANDEGRIFT, CLERK
UNITED STATES DISTRICT COURT
/s/ BY: SUSAN L. INGLE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
OF THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

Civil Action No. 76 G0791E

FEDERAL DEPOSIT INSURANCE CORPORATION, a corporation organized and existing under the laws of the United States of America, *Plaintiff*

v.

BANK OF HEFLIN, an Alabama banking corporation, *Defendant*

and

M. M. MILES, JACK R. WOOD, and JACQUELINE S. WOOD, *Intervening Defendants*

MOTION TO DISMISS PETITION FOR SUPPLEMENTAL RELIEF or, in the ALTERNATIVE, an ORIGINAL ACTION

Comes now M. M. Miles, Jack R. Wood, and Jacqueline S. Wood and move this Court to dismiss the pleading entitled "Petition for Supplemental Relief or, in the Alternative, an Original Action" and as grounds therefor avers as follows:

(1) This Court has no jurisdiction over the matters and things alleged in the said petition;

(2) The said petition fails to allege facts sufficient to state a claim upon which relief may be based;

(3) Said petition constitutes an attempt to collaterally alter the judgment of the Supreme Court of Alabama and is due to be dismissed.

Taken under advisement, 7-9-76, Guin, Judge

Respectfully submitted,

RUTLEDGE & PRUETT

/s/ By W. EUGENE RUTLEDGE
Attorneys for Intervening Defendants.

FILED IN CLERK'S OFFICE
NORTHERN DISTRICT OF ALABAMA

JUN 28 1976

JAMES E. VANDEGRIFT, CLERK
UNITED STATES DISTRICT COURT
BY GENE E. BELL

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 76-G-0791-E

FEDERAL DEPOSIT INSURANCE CORPORATION, a corporation organized and existing under the laws of the United States of America,
Plaintiff

v.

BANK OF HEFLIN, an Alabama banking corporation,
Defendant

and

M. M. MILES, JACK R. WOOD, and JACQUELINE S. WOOD,
Intervening Defendants

ORDER

This cause came on to be heard on the intervening defendants' motion to dismiss petition for supplemental relief or, in the alternative, an original action. Having fully considered said motion in light of the pleading and applicable authorities, the court is of the opinion and it is hereby ORDERED, ADJUDGED, and DECREED that intervening defendants' motion to dismiss is OVERRULED.

It is FURTHER ORDERED that this action is to be deemed an original action and, as such, the style of this case shall hereafter be designated as *Bank of Heflin, an Alabama banking corporation,* plaintiff, *vs. M. M. Miles, Jack R. Wood, and Jacqueline S. Wood,* defendants.

It is FURTHER ORDERED that the defendants answer the complaint within 30 days from the date of this order.

DONE and ORDERED this 2nd day of September 1976.

/s/ By J. FOY GUIN, JR.
United States District Judge
J. Foy Guin, Jr.

FILED IN CLERK'S OFFICE
NORTHERN DISTRICT OF ALABAMA

SEP 3 1976

JAMES E. VANDEGRIFT, CLERK
UNITED STATES DISTRICT COURT
BY: SUSAN L. INGLE

APPENDIX E

THE STATE OF ALABAMA - - - - JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
SPECIAL TERM, 1975

S.C. 1026

Ex Parte: M. M. MILES, et al.

PETITION FOR ALTERNATIVE WRIT OF MANDAMUS, ETC.

(In Re: Bank of Heflin

v.

M. M. Miles)

FAULKNER, JUSTICE.

The questions for decision in the instant case are whether or not stockholders are entitled to examine all of the records of the Bank of Heflin when demand has been made as required, and whether or not the extraordinary writ of mandamus should issue in this case. We grant the writ.

M. M. Miles wrote two letters, dated 12 and 19 August, 1974, to the Bank of Heflin, requesting an unlimited inspection of the books and records of the Bank. The second letter alleged one or more proper purposes for an inspection: to ascertain whether any action had been taken contrary to the best interests of the stockholders, such as misuse of corporate funds; abuse of corporate office; diversion of corporate assets to the personal benefit of any officer, director, employee, or stockholder; misapplication of corporate assets, or favoring of certain customers of the Bank because of personal connections with officers or

directors of the Bank; and to determine whether the directors have lived up to their fiduciary obligation to the stockholders.

Uncertain of the propriety of disclosing all of its records, the Bank filed a complaint for declaratory judgment, asking the circuit court to determine what records the defendant, Miles, was entitled to under Title 10, § 21 (46). Similar letters were received from Mr. and Mrs. Jack R. Wood, also stockholders of the Bank. They were added as defendants. Miles and the Woods counterclaimed for the statutory penalty of 10% of the value of the shares they owned. All parties filed motions for summary judgment, along with numerous affidavits and depositions. No oral testimony was taken before the court.

On October 23, Judge Parker granted summary judgment for the complainant and issued his orders in the case. He found that proper notice had been given and one or more proper purposes alleged; that the filing of suit by the Bank was not a "refusal" to allow inspection of its records; that the directors have a fiduciary duty to the stockholders and customers and that because of the confidential relationship between the Bank and its customers, the stockholders' right to examine the Bank's records was limited. Judge Parker appointed a master to examine the Bank's records so that the stockholders could get a full and adequate review of the Bank's business without bringing about an unnecessary invasion of the private, confidential relationship between the Bank and its customers. He said that upon receipt of the master's report, he would set the time and place for review of the books and records of account, minutes, and record of stockholders and whatever else was deemed proper.

The defendants, Miles and the Woods, then petitioned for an alternative writ of mandamus or a

rule nisi. The rule nisi was issued on November 13. The case is here for decision on the writ of mandamus.

The petitioners assert that they have, since they have made a proper demand alleging a proper purpose, a right of access to any and all records and writings of any kind or nature relating to the Bank of Heflin. They also contend that mandamus in this case is a proper method of reviewing the orders issued by the trial judge. They contend that mandamus is required, since an appeal would be inadequate; that the books and records of the Bank would change with time and could never be reconstructed to their present state. To review the appointment of a master and to expedite the disposition of the case, mandamus is the proper proceeding.

The position of the Bank in the initial controversy, and its position at the current stage, is that it has a duty to its customers not to disclose certain confidential memoranda, individual files, and materials from which the books and records of the account are prepared. This duty exists because of the Bank's fiduciary relationship with its customers and because of the strictures imposed on it by the banking laws and regulations. Stockholders can examine certain records if they have a "proper purpose;" certain others can never be viewed by the stockholders. The Bank is unsure which records should be disclosed; for this reason it argues that the trial court properly used its powers in appointing a master to ascertain which records the stockholders have a right to examine. It approves the action of the trial court judge and asserts that review of his action should be by appeal.

In additon to common law inspection rights, stockholders now have rights under statutes. Alabama's statute, Title 10, § 21 (46), is based largely on the ABA-ALI Modern Business Corporation Act, § 52, which

enlarged and extended the common law right. Numerous cases in Alabama have upheld the shareholders' inspection rights based on the common law and statutes. *Alabama Gas Corp. v. Morrow,* 265 Ala. 604, 93 So.2d 515 (1957); *Loveman v. Tutwiler Inv. Co.,* 240 Ala. 424, 199 So. 854 (1941); *Burns v. Drennen,* 220 Ala. 404, 125 So. 667 (1930); *Birmingham News v. State ex rel. Dunston,* 207 Ala. 440, 93 So. 25 (1921); *Foster v. White,* 86 Ala. 467, 6 So. 88 (1889).

In *Birmingham News,* while interpreting the Code of Alabama 1907, § 3477, the precursor to Title 10, § 21 (46), this court held that the statutory inspection right in Alabama was equally inclusive with the common law right. And, at common law the inspection right covered all the books and records of the corporation, including corporate documents, contracts and papers, but not including secret researches and the results of skilled and technical investigations. Cf. *Otis-Hidden Co. v. Scheirich,* 187 Ky. 423, 219 S.W. 191 (1920); *Electro-Formation v. Ergon Research Laboratories,* 284 Mass. 392, 187 N.E. 827 (1933).

The only express limitation of our statutory right of inspection is that it must be exercised at reasonable and proper times; and implied limitation is that it must not be exercised from idle curiosity, or for improper or unlawful purposes. *Smith v. Flynn,* 275 Ala. 392, 155 So.2d 497 (1963). In all other respects the statutory rights is absolute. The purpose of the statute, like that of the common law right, is to protect small and minority shareholders against the mis-management and faithlessness of their agents and officers, by furnishing the mode and opportunity to ascertain, establish, and maintain their rights.

What inspection can be made by a stockholder of a bank? One that is for a proper purpose and does not interfere with the bank's conduct of its business. The inspection rights of stockholders of a bank are the same

as stockholders of a corporation generally.

A case similar to the one at hand is *Cooke v. Outland,* 265 N.C. 601, 144 S.E.2d 835 (1965). There, a North Carolina statute, G.S., § 55-38, similar to the Alabama provision, Title 10, § 21 (46), was construed to apply to domestic bank corporations and to authorize an inspection of the bank's books and records by a shareholder for the purpose of determining the value of his stock, the financial condition of the bank, and the efficiency of the bank's management. Subsequently, the North Carolina legislature modified the law to restrict the inspection, but permitted it for "good cause shown." Good cause can be found in this case.

The Bank asserts that mandamus will not lie in the absence of a prior application to the court below to set aside the order complained of. Citing *Wood v. City of Birmingham,* 247 Ala. 15, 22 So.2d 331 (1945); *Ex Parte Edwards,* 123 Ala. 102, 26 So. 643 (1899); and *Ex Parte Bozeman,* 213 Ala. 223, 104 So. 402 (1925).

It would be a futile gesture for Miles and Woods to file a petition to set aside the court's order. The trial judge says he ordered the appointment of a master because he did not know what records were kept by the Bank of Heflin; that he must have some knowledge of the number and description of the records kept by the Bank.

This court in ordering that the rule nisi be issued to the trial judge, ordered him to enter an order allowing examination and audit of *all books and records* of the Bank, or show cause why he should not.

The trial judge answered in brief that the remedy here is appeal, and mandamus is no substitute for appeal. In this case we are of the opinion appeal is not an adequate remedy. Here the right of inspection of the Bank's records is a clear legal right. And, where the

right sought to be enforced is a clear legal right, the allowance of which is a matter of peremptory duty, and not of judicial discretion, there can be but little doubt or difficulty in determining the propriety of the remedy by mandamus. *Ex Parte Watters,* 180 Ala. 523, 61 So. 904 (1913). The test for issuing mandamus depends on whether remedy by appealing is adequate to prevent undue injury. *Ex Parte Weissinger,* 247 Ala. 113, 22 So.2d 510 (1945). If these parties have to wait for a master's report, and then appeal, it may be impossible to ascertain the state of the records at the time of the alleged wrong done them. Thus, they would suffer undue injury.

It is obvious that certain activities of the Bank are not reflected in the ledger of official action. The principles of equity, fair dealing, and good faith give the stockholders the right to know how the affairs of the Bank are conducted, and whether the capital, a part of which they contributed, is being prudently and profitably employed. The petitioners do not want to ramble through the books and records; they want merely an inspection by their accountants.

The right to inspect was a broad right at common law; Alabama has codified the common law, with slight exceptions. Banks are to be regarded as corporations under the Alabama statute. The applicable statute is not limited to "relevant" books and records; it is to be liberally construed. The shareholders advanced a proper purpose for inspection; their request was not overly broad, as it tracked the language of the statute. Hostility on the shareholders' part toward the officers of the Bank will not defeat their request; neither will the fact of mere confidentiality of the books and records sought. The inspection by the petitioners will not unnecessarily interfere with the Bank's conduct of business.

THE WRIT IS DUE TO BE GRANTED.

Heflin, C.J., Bloodworth, Almon, and Embry, JJ., concur.

21 August 1975

APPENDIX F

THE STATE OF ALABAMA - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1975-76

S. C. 1315

M. M. MILES

v.

BANK OF HEFLIN

Appeal from Cleburne Circuit Court

JONES, JUSTICE.

This is an appeal from a summary judgment denying M. M. Miles and other stockholders of the Bank of Heflin the 10% penalty provided under Tit. 10, § 21(46). The Bank told them that certain limitations would be placed upon their access to the Bank's records. Among the things the Bank wanted to prevent the stockholders from inspecting were financial statements of borrowers, reports of examinations of the Bank by federal and state regulatory authorities, and information which would disclose the salaries paid to individual employees of the Bank. To limit the scope of inspection, the Bank filed a declaratory judgment action. The stockholders filed a counterclaim for the statutory 10% penalty. Both parties filed motions for summary judgment upon affidavits and depositions.

The trial Court agreed with the Bank that the inspection should be limited and appointed a Master to determine the scope of permissible inspection. The Court then granted the Bank's motion for summary judgment against the stockholders' counterclaim for the penalty. The stockholders brought mandamus to enforce their right to full inspection of the records and

filed an appeal to review the summary judgment denying the penalty. A writ of mandamus requiring the trial Court to order the Bank to permit full inspection was granted on August 21, 1975, in *Ex Parte Miles,* Ala. , 318 So.2d 697 (1975). The case now before us is the appeal from the summary judgment on the penalty. The Bank has filed a motion to dismiss the appeal.

There are two issues for review. First, whether the Bank's motion to dismiss the stockholders' appeal is due to be granted. Second, if the appeal is not dismissed, whether the trial Judge erred in granting a summary judgment against the stockholders' counterclaim for the statutory penalty.

I.

On the Motion to Dismiss Appeal

The Bank contends that the stockholders are attempting to appeal from an incomplete adjudication of the case below. It contends that ARCP 54(b) prevents the appeal because, when the stockholders appealed, the trial Judge had entered a judgment only upon the counterclaim for the penalty, and the trial Judge had not made "an express determination that there is no just reason for delay and an express direction for the entry of judgment." ARCP 54(b).

This Court, in *Cates v. Bush,* Ala. , 307 So.2d 6 (1975), discusses the effect of Rule 54(b) and its relationship to Alabama's prior statutory provisions for appeal and holds that Rule 54(b) neither supersedes, nullified, nor modified Tit. 7, § 754, Code, relating to the finality of judgments. *Cates* further observes, "Title 7, Section 754, provides that, except in unusual circumstances, appeal must be only from a final judgment. Rule 54(b) merely sets out one instance where a judgment may now be made final although it

would not have been final prior to the adoption of the new rules." Therefore, to determine whether the stockholders' appeal should be dismissed, we must not confine our inquiry to the language of Rule 54(b), but we must look to all applicable Alabama law.

Our inquiry must begin with a review of the procedural posture of this case at the time of the stockholders' appeal. The order of the trial Judge, the subject of this appeal, primarily did two things. First, it denied the stockholders' demand for unlimited inspection and appointed a "Special Master" to inspect the Bank's records to determine which records the stockholders should be allowed to inspect. Second, it granted the Bank's motion for summary judgment on the counterclaim for the statutory penalty.

The stockholders brought mandamus to compel full inspection and brought appeal to revise the order denying the statutory penalty. A writ of mandamus was granted in *Ex Parte Miles,* supra. The rationale for granting mandamus in that case was that the stockholders were being denied "a clear legal right, the allowance of which is a matter of peremptory duty, and not of judicial discretion," citing *Ex Parte Watters,* 180 Ala. 523, 61 So. 904 (1913), and *Ex Parte Weissinger,* 247 Ala. 113, 22 So. 2d 510 (1945).[1]

Granting mandamus, says the Bank, on the issue of inspection operates to preclude the instant appeal under Rule 54(b). The Bank contends, by granting mandamus, this Court acknowledged that the entire case had not been fully adjudicated below; therefore, the appeal on the penalty is an appeal from a nonfinal

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[1]Moreover, it has long been recognized that mandamus is the appropriate remedy whenever a board of directors refuses its stockholders the right to inspect corporate records. *Alabama Gas Corporation v. Morrow,* 265 Ala. 604, 93 So.2d 515 (1957), and *Loveman v. Tutwiler Inv. Co.,* 240 Ala. 424, 199 So. 854 (1941).

judgment; and, without the express direction for entry of judgment under Rule 54(b), it is due to be dismissed. We disagree.

Our holding that mandamus was proper in *Ex Parte Miles,* supra, did not necessarily mean that appeal was not also available. It only meant that appeal was not adequate because of the exigencies of the situation and because of the peremptory, nondiscretionary duty violated by the trial Judge. To determine whether appeal is proper in the instant case, it is necessary to determine whether the trial Judge's order, in all its component parts, was appealable when he entered it. If it were appealable at that time, then the "express determination" and "express direction" requirements of Rule 54(b) are unnecessary. *Cates v. Bush,* supra.

We hold that the trial Judge's order appointing a Master to determine which records the stockholders could properly inspect is a final judgment for purposes of appeal; therefore, the summary judgment on the penalty is not a partial judgment and it is appealable without a Rule 54(b) determination and direction.

A large body of case law has developed around the problem of when an order which refers part of a case to a register or master is a final judgment. *Chadwick v. Town of Hammondville,* 270 Ala. 618, 120 So.2d 899 (1960). The first Alabama cases on the problem are now over 130 years old and their rules have been followed consistently. The earliest statement is "that a decree 'is final when it ascertains all the rights of the parties in litigation,' although there may be a reference to the master to ascertain facts for an account between the parties." *The Bank of Mobile v. Hall,* 6 Ala. 141 (1844), and *Weatherford v. James,* 2 Ala. 170 (1841).

The rule arose in equity jurisprudence because old Equity Rules 79 through 88 were the only effective vehicle for appointing masters prior to the adoption of

the Alabama Rules of Civil Procedure. As the equity rule developed, it was broadened to apply to various equity situations. The most common statement is, "The test of the finality of a decree sufficient to support an appeal is that it ascertains and declares the rights of the parties and settles the equities, and is not controlled by the fact that the cause remains in fieri in respect to other matters." *McCulloch v. Roberts,* 290 Ala. 303, 276 So.2d 425 (1973); *Moorer v. Chastang,* 247 Ala. 676, 26 So.2d 75 (1946); *Carter v. Mitchell,* 225 Ala. 287, 142 So. 514 (1932).

ARCP 53 has now superseded old Equity Rules 79 through 88, and ARCP 2 has merged the procedural distinction between law and equity into one form of action--the "civil action". Rule 53 provides for reference to a master in any civil action in which the presiding judge finds it necessary. It is now incumbent upon this Court to determine whether the equity case law allowing appeal after a reference to master should be extended to the Rule 53 situation. The rationale for the equity rule was articulated in one of the early cases. That rationale is: If the chancellor has erroneously ascertained the merits of the case, the delay, expense, and trouble attending the ascertainment of facts and preparation of a report by the master are unnecessary and profitless. *The Bank of Mobile v. Hall,* supra.

We find that the policy articulated by this Court in *The Bank of Mobile* case is as applicable today as it was in 1844. Rule 53(a) provides that "the compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties . . . as the court may direct." In the instant case, the Court ordered the Bank of Heflin, Miles, and the Woods to pay $400 each to defray expenses of the Master. If if is determined that the trial Judge adjudicated all of the merits of the case, and the stockholders were going to

appeal regardless of the content of the Master's report, it would be "unnecessary and profitless" for them to await the Master's report before appealing. This is the same situation this Court faced when appeals were brought from equity trials after reference to a master and the same rule must apply here.

We now address the question of whether the instant case falls within the scope of the rule allowing appeal from orders which include references to masters. The purpose of this inquiry, it must be remembered, is not to determine the propriety of our granting mandamus in *Ex Parte Miles,* supra, but rather, it is to determine whether the trial Judge's order constituted a final judgment in all of the claims, thereby taking this case beyond the scope of Rule 54(b). The mere fact that the Court has ordered a reference to a Master is not, of itself, sufficient to make out a final judgment for purposes of appeal. It is also necessary that the trial Judge has decided "the substantial merits of the controversy--the material issues of fact and law litigated or necessarily involved in the cause, which determine the legal rights of the parties, and the principles by which such rights are to be worked out." *Adams v. Sayre,* 76 Ala. 509 (1884).

In the instant case, we can determine what material issues of fact and law are involved in the controversy from the pleadings of the parties. The Bank's complaint prayed that the Court set forth in detail the books, records of account, memoranda, and other information that the stockholders were entitled to see, but that it deny the stockholders access to confidential information and information held by the Bank in its fiduciary relationship with its customers. The stockholders' answer denied that the Bank had a right to withhold any records from stockholder inspection based on its claim of confidential relationship and

prayed that the Court direct the Bank to immediately make available all of its books and records of account for their examination.

In its order, the Court found:

(1) That the Bank's fiduciary relationship duty to its customers did place limitations upon the access to all writings or records of the Bank.

(2) That the stockholders could not have access to the individual files and memoranda from which the books and records are prepared.

(3) That the Bank should not reveal such things as amount on deposit or savings of customers, individual certificates of deposit, and private memoranda of customers.

After making these findings, the Court referred the matter to a Special Master who was directed to return a report specifying which of the Bank's records did not fall within the category of confidential information and were, therefore, available for inspection.

When the Court made its findings and issued its decree in accordance therewith, including reference to the Master, it adjudicated the substantial merits of the controversey. It granted the Bank's request to limit the inspection and denied the stockholders' demand for complete inspection. All that remained was for a Master to determine exactly which of the Bank's records fell within the prohibited category. Regardless of what the Master reported, he could not have broadened, or otherwise enlarged upon, the limited right of inspection as decreed by the Court. Thus, the stockholders lost their case on the merits and their right of appeal necessarily accrued at that time. Indeed, had the stockholders awaited the Master's report, they would have risked the running of the statutory period for appeal. *O'Rear v. O'Rear,* 227 Ala. 403, 150 So. 502 (1933).

This situation falls exactly within the policy behind allowing appeals, under certain circumstances, from reference to masters. We find that it would have been "unnecessary and profitless" for the stockholders to have awaitedthe Master's report to appeal; and we hold that, under the *adjudication of substantial merits rule* set out in *McCulloch,* the order appointing the Master was final and would have supported an appeal. Therefore, the stockholders' appeal from the summary judgment entered against their counterclaim for the statutory penalty is not an appeal from a nonfinal judgment and it is not due to be dismissed. Motion to dismiss the appeal is denied.

II.

On the Merits of the Appeal

The trial Judge granted the summary judgment and dismissed the stockholders' counterclaim because he found that "the filing of the declaratory judgment action does not constitute a refusal or denial of the records." Our review of the trial Court's order granting a motion for summary judgment requires us to address two issues.

First, whether the trial Judge's decision is legally correct. Second, whether affidavits and depositions of the parties show there was no genuine issue of material fact as required by Rule 56(c).

On the first issue, we must decide whether a declaratory judgment filed by a corporation to limit stockholders' inspection of corporate records is a "refusal" of the stockholders' demand as a matter of law. The purpose of the statutory penalty is to make corporate records more accessible to stockholders. If there were no penalty, the usual course for a stockholder seeking inspection would be to file suit to enforce his right. The expense of such litigation would discourage many stockholders from pursuing their

rights. The penalty forces a corporation to assume financial responsibility for its refusal.

If we were to hold that filing of declaratory judgment action was not a refusal as a matter of law, then the Board of Directors can easily circumvent the penalty provision while still putting the stockholders to the expense of litigation to enforce their inspection rights. By rendering the penalty provision inoperative, declaratory judgment actions would shield the Board from the demands of those stockholders who cannot afford to pursue litigation.

Therefore, we cannot agree that filing a declaratory judgment action is not a refusal to allow inspection. The fact that the Board of Directors, rather than the stockholders, has instituted the litigation cannot exonerate the Board of its duty to allow inspection. We therefore hold that when the Board forced the stockholders to litigate in order to pursue their rights, it effectively refused to allow inspection.

The remaining issue for liability under the penalty statute is whether the Bank's refusal to allow full inspection of its books and records was "without reasonable cause." Tit. 10, § 21(46). Ordinarily, this question of reasonable cause is a disputed factual issue to be determined with reference to the facts and circumstances in each case.[2] As the Committee Comments to Rule 56 state: "The summary judgment procedure is not a substitute for the trial of disputed issues of fact. On a motion for summary judgment, the court cannot try issues of fact." 3 Barron and Holtzoff, *Federal Practice and Procedure,* § 1231, 1958.

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[2]For an in depth discussion of the objective test applicable to the statutory requirements that the examination of the books and records by a stockholder be for a "proper purpose" and that the penalty be imposed for an officer's refusal of such examination "without reasonable cause", see *Smith v. Flynn,* 275 Ala. 392, 155 So.2d 497 (1963).

The posture of the record in the instant case, however, reveals an *out of the ordinary* situation. Following responsive pleadings, including counterclaims for the statutory penalty, filed by the stockholders to the Bank's Bill for Declaratory Judgment, each of the parties, with supportive affidavits and depositions, moved the Court for summary judgment. Understandably, when the trial Court denied the stockholders the right of full inspection, it likewise denied their motions for summary judgment and, consistent therewith, granted the Bank's motion for summary judgment. This had the effect of dismissing the stockholders' counterclaims.

Unquestionably, had the trial Court denied the Bank's sought for relief limiting the stockholders' right of full inspection, it likewise would have denied the Bank's motion for summary judgment. *Ex Parte Miles,* supra, revised the trial Court's order denying full inspection on the basis of the clear and nondiscretionary mandate of the statute. Moreover, the right of a stockholder, within reasonable limits and for proper purposes, to inspect the books and records of the corporation in which he owns an interest, absent a contract to the contrary, is hardy dependent upon legislative expression. Indeed, any effort to statutorily limit such right by arbitrarily excluding certain books and records from the scope of full inspection would raise serious constitutional questions.

Given the revision of the trial Court's order denying full inspection affected by *Ex Parte Miles,* and given our conclusion that in the context here presented the Bank's filing of a declaratory judgment action was an effective denial of the stockholders' request for such inspection, we necessarily must reverse the order below granting the Bank's motion for summary judgment and

dismissing the stockholders' counterclaims. This is not to say that the Bank's mere filing of a declaratory judgment action in itself is an effective denial of the right of inspection. Rather, we say that the basis for the denial was the defense of confidentiality and upon that basis there was an effective denial of the right of inspection resulting in the right to recover the statutory penalty under Tit. 10, § 21(46).

The only basis for the Bank's refusal is summed up in its President's deposition when he states that the Bank's confidential relationship with its customers made a declaratory judgment action reasonable, and thus its refusal was *with* reasonable cause. Since this constitutes a legal contention merely, which has been rejected by *Ex Parte Miles* and the instant appeal, the trial Court is directed on remand to grant the stockholders' motions for summary judgment and assess against the Bank in favor of each stockholder respondent a penalty equal to 10% of the value of the stock owned by each respective stockholder.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Merrill, Bloodworth, Maddox, Faulkner, Almon, and Embry, JJ., concur.

Shores, J., concurs specially.

Heflin, C. J., not sitting.

SHORES, JUSTICE (Concurring specially):

I agree with the result and agree that Rule 54(b), ARCP, has no application since, in my view, the order entered by the trial court, granting the bank's motion for summary judgment and limiting the appellants' right to full inspection, was a judgment which was final and therefore appealable.

As to these appellants, stockholders, the ruling of the trial court could not have been more adverse, nor final. The ruling denied every aspect of relief which they

sought without reservation. It was their contention that they were entitled to full inspection of the records of the bank. The appointment of a master to select what parts of those records could be inspected was, as far as the stockholders were concerned, a denial of their claim of right to inspect all of the records. Regardless of what the master produced, it would necessarily be less than they sought to inspect. Therefore, I think appeal was proper and that the method of review should have been utilized to test the propriety of the trial court's refusal to permit full inspection of the records. The fact that the court has granted a petition for writ of mandamus, as to the right to inspect, does not destroy the finality of the judgment entered and appealed from here, but candor requires us to admit that piece-meal review has been the result.

18 December 1975

APPENDIX G

On Rehearing

This Court notes that the Bank has retained new counsel who has filed an extensive brief in support of its application for rehearing. For that reason, we feel constrained to file an extended written opinion, addressing the important points raised in the application.

The arguments urging our modification of the original opinion fall into three categories:

1. The trial Court did not consider the stockholders' motion for summary judgment on their counterclaim for the penalty; therefore, the issue was not before this Court for review.
2. Regardless of whether the trial Court considered the stockholders' motion, this Court erroneously remanded the cause with instructions to enter a summary judgment in favor of the stockholders because the questions of the stockholders' "proper purpose" and the Bank's "reasonable cause" for refusal are issues for trial, and because the stockholders did not assign as error the trial Judge's denial of their motion for summary judgment.
3. The 10% penalty prescribed by Title 10, § 21 (46), is a maximum figure, not an absolute standard; therefore, the trial Court is authorized to set the penalty on a continuum up to 10%.

First, the record sets out the stockholders' motion for summary judgment on their counterclaim for the penalty. The motion is accompanied by affidavits which include the stockholders' letters to the Bank demanding inspection of books and records and the

depositions of the Bank's stockholders, president, attorney, and public relations officer. The trial Judge's order is prefaced with the following statement: "This is a declaratory judgment and is submitted on motions by the respective parties for a summary judgment on the pleadings, affidavits and depositions on file in this case." There is no order in the record striking the stockholders' motion for summary judgment and whether the trial Judge, in fact, did consider the motion is not material to this Court's review of the trial Court's propriety in not granting it.

Where the parties have moved for summary judgment under Rule 56 and submitted supporting affidavits, which establish that there is no genuine issue of material fact, appellate courts are authorized to remand the case with instructions for entry of summary judgment. *Sayre v. City of Cleveland,* 493 F.2d 64 (1974). We therefore find no merit in the Bank's first argument.

The Bank's second argument is that determinations of "proper purpose" and "reasonable cause" were genuine issues of material fact. *Smith v. Flynn,* 275 Ala. 392, 155 So.2d 497 (1963), explains that the burden is on a corporation to prove improper purpose; therefore, if the corporation does not question the stockholders' purposes, there is no issue for trial. The stockholders' demand for inspection alleged proper purposes such as inquiries into: misuse of corporate funds, the abuse of corporate office, the diversion of corporate assets to the personal benefit of any officer, director, employee or stockholder, and the favoring of certain customers of the Bank because of their personal connections with the officers or directors. The depositions of the stockholders which accompanied their motion for summary judgment set forth specific occurrences which made them suspect corporate

mismanagement. Two examples of the suspected mismanagement were the Bank's purchasing land from a board member at more than its market value and the Bank's making a substantial loan to a board member who could offer only a second mortgage as security.

The Bank offered no affidavits to establish improper purpose. Rule 56(e), in pertinent part, provides:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

The last sentence of 56(e) has been interpreted to mean that even if the adverse party files no affidavits opposing the motion, a summary judgment can be entered against him only if "appropriate." *Dawkins v. Green,* 412 F.2d 644 (5th Cir. 1969). We hold that this is an appropriate case for the entry of summary judgment for two reasons. First, the president of the Bank on direct examination by the stockholders' attorney admitted that he had no reason to believe that Mr. Miles had some purpose for asking to see the records other than to determine the way the bank had been operated. Second, the burden is on the corporation to prove that the stockholders' demand is not for a proper purpose. *Smith v. Flynn,* supra. Therefore, if the Bank offers no evidence of improper purpose and in fact admits through its president that there is no reason to suspect improper purpose, the question of purpose is not an issue for trial.

On the "reasonable cause" issue, again, the burden

rests with the corporation. The trial Judge found that the peculiar fiduciary relationship between a Bank and its customers ereated a reasonable cause for the Bank's refusal to permit inspection. This Court, however, reversed that finding in *Ex parte Miles,* Ala. , 318 So.2d 701 (1975), holding that the inspection rights of stockholders of a bank are the same as stockholders of a corporation generally, Thus, *Ex parte Miles* finally resolved the question of "reasonable cause", and that issue is not before the trial Court on remand. Since all of the triable issues--issues of law, not of fact--are resolved in this Court, the only proceeding remaining for the trial Court is to grant a summary judgment in favor of the stockholders. *Millworth Converting Corp. v. Slifka,* 188 F.Supp. 629 (S.D. N.Y. 1960).

As to the propriety of our instructions to grant a summary judgment, the Bank argues that the issue of the trial Judge's denial was not before this Court on appeal because it was not assigned as error. Our instruction, however, is not grounded upon a reversal of the trial Judge's erroneous denial of the stockholders' motion for summary judgment. Rather, our instruction is an acknowledgement that the trial Judge correctly found that there were no triable issues. Our authority for the instruction is not the rules of appellate procedure, as the Bank assumes, but rather the mandate of Rule 1 of ARCP. Rule 1 requires that the rules "shall be construed to secure the just, speedy and inexpensive determination of every action." Since the material issues of this case have been disposed of by the affidavits of the parties,by *Ex parte Miles,* and by our original opinion, a trial is unnecessary.

This situation falls squarely within the purpose of Rule 56 to "improve the machinery of justice, promote the expeditious disposition of cases, and avoid unnecessary trials where no genuine issues of fact are

raised." 10 Wright and Miller, *Federal Practice and Procedure,* § 2712 (1973). Where there are no triable issues of fact, as here found by the trial Court and with which finding we agree, and the legal issue presented has been resolved against the Bank, our mandate on reversal for the entering of a summary judgment in favor of the stockholders necessarily follows.

Finally, the Bank takes issue with the latter portion of the last sentence of our original opinion: ". . . and assess against the Bank in favor of each stockholder a penalty equal to 10% of the value of the stock owned by each respective stockholder." Of the three points raised, the first two were treated, at least to some degree, in the original opinion. While, in deference to counsel's earnest insistance, we have not considered the first two points lightly, it is this 10% penalty issue--treated only summarily in the original opinion--to which we have devoted the most time and effort in our consideration of this cause on rehearing.

We find ourselves in substantial agreement with the policy arguments advanced by counsel for the Bank that the penalty should be *up to 10%* with guidelines for the discretionary fixing of the amount according to the gravity and circumstances of the wrong for which the penalty is imposed. To eliminate all discretion and require the imposition of the penalty by an absolute standard, says counsel for the Bank, treats all refusals to allow inspection of corporate books and records, not sustained on "improper purpose" grounds, as equal in degree and severity. It would further encourage refusal to a relatively small stockholder as opposed to the request of a large stockholder where the risk of refusal would prohibit a contest even in legitimate "improper purpose" cases. Our prerogatives on appellate review, however, do not extend to policy making but rather to judicially interpreting the legislative policy.

The primary authority cited by the Bank in support of its proposition that the penalty statute should be interpreted as a maximum rather than an absolute standard is the case of *McCormick v. Statler Hotels Delaware Corporation,* 55 Ill. App.2d 21, 203 N.E. 2d 697 (1964). In upholding a penalty award of less than 10% under an identical statute, this intermediate appellate court observed:

> ". . . the statute says an officer or corporation, '. . . shall be liable . . . in a penalty of ten per cent of the value of the shares owned by such stockholder. . . .' The question here is the meaning of 'shall be liable.'
>
> ". . . The [Illinois] Supreme Court said in that case [People v Elgin Home Protective Ass'n, 359 Ill. 379, 194 N.E. 584 (1935)], 'The words "may" and "shall," when used in a statute, will sometimes be read interchangeably, as will best express the legislative intent.' On this basis, it is possible for us to find that the imposition of a penalty rests in the discretion of the Court below.
>
> "We can reach this same result through interpreting the word 'liable.' Being liable for a ten per cent penalty could mean the defendants are subject to a fine up to ten per cent of the value of the stock . . ."

We cannot accept either bases for interpreting "shall be liable . . . in a penalty of ten per cent . . ." as permitting a discretionary penalty imposition not to exceed 10%. The interchangeability of "may" and "shall" to effect legislative intent is a sound rule; but it can be given a field of operation only where the overall expression of the legislative enactment evidences an intent and purpose contrary to the term employed. See

Morgan v. State, 280 Ala. 414, 194 So.2d 820 (1967). Here, no contrary intent which permits "may" to be substituted for "shall" is manifest.

Perhaps the word "liable" could be interpreted as subject to a fine *up to* 10% (one of its secondary meanings being "likely to") except that it is preceded by the words "shall be." To be subject to a "likely to" connotation, the sentence would read, "A corporation is liable to a fine of 10%." This interpretation is precluded, however, by the phrase "shall be liable . . . in a penalty of 10%," particularly where this is the only expression of legislative intent and its mandatory imposition is in harmony with the overall spirit of the "right of stockholders to inspect corporate records" statute.

OPINION EXTENDED AND APPLICATION FOR REHEARING OVERRULED.

All the Justices concur, except Heflin, C.J., not sitting.

5 March 1976

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

Civil Action No. 75-G-1829-E

FEDERAL DEPOSIT INSURANCE CORPORATION, a corporation organized and existing under the laws of the United States of America,
Plaintiff,

v.

BANK OF HEFLIN, an Alabama banking corporation,
Defendant

and

M. M. MILES, JACK R. WOOD, and JACQUELINE S. WOOD,
Intervening Defendants

ORDER

This cause came on to be heard by the court on the plaintiff's motion for an injunction prohibiting the defendant bank "from disclosing any FDIC report of examination or any record of the Defendant containing any information derived from or relating to any FDIC report of examination of the Defendant." The court conducted a hearing on October 7, 1975, and pursuant to Rule 65(a) (2), and with consent of all parties, consolidated the hearing for preliminary injunction with trial of the action on the merits..

The court makes the following findings:

1. The court finds that 12 CFR 309.1(c) (ii) is a reasonable and valid regulation providing that:

> The Chief of the Division of Examination may furnish to any bank copies of any reports of examination or investigation of such bank ... *Provided,* ... under no circumstances shall the bank or any of its directors, officials, or employees disclose or otherwise make public in any manner such reports or any portion thereof ...

2. The intervenors have requested production of certain documents by the defendant, and contained in those documents are portions which plaintiff claims to be privileged information under 12 CFR 309.1(c) (ii).

3. The court has examined the documents containing the allegedly privileged information, and finds (a) that on the document marked as exhibit 2(A), the material blacked out is not privileged, except for the words following, and in the same sentence as, the words "State Banking Department," and (b) that on those documents marked as exhibits 2(B) through 2(N), the blacked-out material is privileged, except for the material blacked out in exhibit 2(K).

Accordingly, it is ORDERED, ADJUDGED and DECREED that the defendant bank be, and is hereby, permanently enjoined from disclosing or otherwise making public in any manner those portions of the documents referred to above which the court has found to be privileged. It is FURTHER ORDERED that Mr. W. Eugene Rutledge, attorney for the intervening defendants, having been shown all the privileged portions of the documents referred to above, shall not disclose or make public in any way of the material decreed by this order to be privileged.

DONE and ORDERED this 26th day of November, 1975.

/s/ By: J. Foy Guin, Jr.
United States District Judge
J. Foy Guin, Jr.

FILED IN CLERK'S OFFICE
NORTHERN DISTRICT OF ALABAMA

NOV 26 1975

WILLIAM E. DAVIS, CLERK
UNITED STATES DISTRICT COURT
BY: GENE E. BELL